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205-447—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 776

JACQUES M. SCHIFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 351 F. 2d 91.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1965. A petition for rehearing was denied on October 8, 1965. On October 22, 1965, the time to file a petition for a writ of certiorari was extended by Mr. Justice Stewart to December 7, 1965, and the petition was filed on November 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper for the court to proceed at the conclusion of the trial under Rule 42(a), F.R. Crim. P., in adjudging petitioner, an attorney, guilty of contemptuous conduct during the trial.

2. Whether the court could constitutionally impose a sixty-day sentence after the non-jury contempt proceeding.

3. Whether the court had power to correct an illegal sentence after a notice of appeal had been filed.

4. Whether petitioner's contempt in attempting to have the court divulge certain communications was committed in the presence of the court.

5. Whether petitioner's conduct was contumacious.

STATEMENT

Petitioner was defense counsel for Thomas Ewing Parks, one of the defendants in *United States* v. *Hoffa, et al.*, a jury-tampering trial in the United States District Court for the Eastern District of Tennessee which began on January 20, 1964, and concluded on March 6, 1964. On March 12, 1964, immediately after the convicted defendants in that case had been sentenced, the trial judge read a certificate filed pursuant to Rule 42(a), F.R. Crim. P., in which he found petitioner guilty of criminal contempt (Pet. App. 9–19). After allowing petitioner an opportunity to make a statement, the court imposed a sentence of confinement for 60 days and a fine of $1,000 (R. 3876). After notice of appeal had been filed, the court *sua sponte* struck the fine from the

sentence (R. 3590–3591). The court of appeals affirmed.

The certificate of contempt stated that petitioner's conduct during the trial constituted a deliberate attack on the administration of justice and an attempt to prevent the proper functioning of the court, and that it tended, if uncorrected, to destroy respect for the court. Noting that full appreciation of petitioner's conduct could be had only by actual presence in the courtroom, the court set forth four general areas of contempt with specific citations to pertinent parts of the trial record.

1. The court found that petitioner had repeatedly engaged in abusive and insulting argument to the court, deliberately seeking to provoke the court into taking action that might form a basis of error or cause delay in the trial. The court set forth (Pet. App. 10–13) a number of instances in which petitioner had charged the court with operating a "drum head court martial" and conducting a "star chamber proceeding" and had suggested that the court's conduct "smacked of Stalinism, Hitlerism, Mussoliniism and all kinds of isms * * *." These remarks were made in connection with ordinary rulings such as a limitation on peremptory challenges to alternate jurors and a ruling with respect to a document alleged to be producible under the Jencks Act (Pet. App. 11).

2. Petitioner repeatedly charged the court with aiding the commission of perjury by witnesses and protecting or concealing alleged perjurers. The specific remarks appear at Pet. App. 13–16.

3. Petitioner repeatedly abused and maligned the court to such an extent as to indicate a studied attack on the administration of justice (Pet. App. 16–18). For example, when the court on February 7, 1964, requested petitioner merely to state his objection but to reserve argument until the jury left, petitioner, in the presence of the jury, asked that he be allowed to withdraw from the case because he was being prevented from defending his client and told the court to take over his client's defense (Pet. App. 16–17).[1]

4. The court also found that petitioner deliberately, knowingly, and intentionally sought to use the court to evade the provisions of 47 U.S.C. 605, relating to the unlawful interception and publication of radio communications, by delivering a record of such interceptions in a sealed envelope and having the court file the contents as part of the record (Pet. App. 18–19).

ARGUMENT

1. Petitioner's principal contention is that although his contempt was committed in the court's presence, the district judge had no power in this case to proceed under Rule 42(a), F.R. Crim. P., because the court had failed to warn petitioner during the trial that he would be subject to contempt proceedings for his

[1] In this connection, the judge warned petitioner not to make repetitious arguments on the same objection (R. 3670). When petitioner persisted and said that the court "idly does nothing" and that the court should defend his client (R. 3670–3671), the court said (R. 3671): "Do you have anything further? Just please make a note of this in the record. We will take it up at a later time. The jury will disregard the arguments of counsel.* * *"

conduct (Pet. 7–11). The court of appeals properly rejected this argument on the grounds (1) that petitioner had, on one occasion, been expressly warned that the matter would be taken up "at a later time" (see fn. 1, *supra*) and had often been told specifically "to keep his voice down, to sit down, and to keep within the law" (Pet. App. 6) and (2) that warnings were unnecessary when, "as here, the conduct was clearly contemptuous" (Pet. App. 6).

Early in the case, when petitioner asked for clarification of the judge's instructions that arguments not be made in front of the jury, the judge pointed out that petitioner was an experienced attorney, that there was no limitation upon the examination of witnesses, and that he expected counsel to be aware of what would be proper in the matter of argument (R. 3605). The judge cautioned petitioner against unnecessary argument (R. 3670), told him to keep his voice down (R. 3682) and also stated, on one occasion, when petitioner continued to make legal arguments in the presence of the jury, that he would take the matter up at a later time (R. 3671)—a statement which the court of appeals correctly treated as a warning that contempt proceedings might ensue. Moreover, the record cannot reflect the tone in which the court uttered the "all right" which followed many of petitioner's outbursts (R. 3595, 3685, 3740, 3814, 3817, 3818, 3826). Those remarks may well have suggested disapproval and warning.

This Court sustained, in *Sacher* v. *United States*, 343 U.S. 1, a similar procedure whereby attorneys

were adjudged in contempt for obstructive tactics during the trial. The record in this case supported the court's conclusion that abusive and obstructive conduct had been engaged in by petitioner (pp. 9–11, *infra*). On this record, unlike that in *Sacher*, these were no "incontinent wrangles between court and counsel" (343 U.S. at 38, Frankfurter, J., dissenting), nor could it be said that the judge had shown "such bitter hostility to the lawyers that the accuser should be held disqualified to try them" (343 U.S. at 15, Black, J., dissenting). The record demonstrates, rather, that the judge tolerated petitioner's conduct with equanimity in the course of the trial, warned him specifically on one occasion, and otherwise made entirely clear his disapproval of petitioner's actions. Since the conduct had been committed in his presence, the judge could, at the conclusion of the trial, enter the appropriate certification and order under Rule 42(a), F.R. Crim. P.[2]

2. Petitioner's contention that the imposition of a sixty-day sentence for contempt after a non-jury proceeding was unconstitutional (Pet. 12–15) is patently unsound. This sentence was well within the limit for petty offenses, and could be imposed without the

[2] *Harris* v. *United States*, No. 6, decided December 6, 1965, does not bear on the issue involved here. In *Harris* this Court held that a district judge could not treat as contempt under Rule 42(a) a witness' refusal to testify before a grand jury because the "real contempt" (slip opinion, p. 3) was committed in the grand jury room and not in the presence of the court. The conduct here was committed in the courtroom and constituted "insolent tactics" and an affront to "the dignity of the court."

intervention of a jury even under this Court's *dictum* in *United States* v. *Barnett*, 376 U.S. 681, 695, n. 12. Indeed, in *District of Columbia* v. *Clawans*, 300 U.S. 617, 627–628, this Court observed explicitly that while there might be some doubt whether a sentence of more than six months could be imposed without a jury trial, a penalty of ninety days was within the constitutional bounds.

3. The sentence initially imposed—imprisonment for sixty days and a fine of $1,000—was clearly illegal since only imprisonment *or* a fine is authorized by 18 U.S.C. 401. *In re Bradley*, 318 U.S. 50. The court therefore had power, under Rule 35, F.R. Crim. P., to correct it any time. The jurisdiction to act in this manner existed even though a notice of appeal had been filed. See *Corey* v. *United States*, 375 U.S. 169, 175; *Bartone* v. *United States*, 375 U.S. 52.

4. Petitioner also argues that the conduct set forth in Part IV of the specifications does not amount to contempt in the presence of the court (Pet. 17–18). The relevant facts, in context, are as follows: Petitioner and other counsel, throughout the trial, claimed that they were being followed, that their telephones were being tapped and that they were under such surveillance as to interfere with their consultations with clients. In connection with one such motion, petitioner delivered to the court a sealed transcript as an exhibit on a motion for a new trial without sending a copy to the government (R. 3742–3743). After the court indicated that it would grant a hearing on the claim of surveillance at such time as would

not interfere with the trial (R. 3727), counsel stated that they would seek an order from the court of appeals. In connection with a discussion of the record on such appeal, the district court revealed that it had opened and read the exhibit and made it a matter of public record (R. 3735–3737). The exhibit was a transcript of radio interceptions by one Spindel, an electronic-eavesdropping expert hired by petitioner (R. 3735). Petitioner subsequently stated he had not given a copy of the exhibit to the government "because of the subject matter which it contained in view of the state of the law which we did not want anything published" (R. 3743). Subsequently on March 5, 1964, petitioner sought to deliver to the court in chambers a second document, which the court refused to receive unless it was tendered in open court (see R. 3856). At the hearing on alleged surveillance, held after trial, counsel stated that they did not want to be responsible for divulging the contents of the documents and wished to have the court order it to be opened (R. 3844–3847).

Petitioner was primarily responsible for this course of conduct, and the judge could reasonably infer that he was seeking to misuse the court in order to avoid personal involvement in the commission of an offense. The conduct which formed the gist of the contempt was the act of tendering the sealed documents to the court in order to have the judge unwittingly make the disclosure forbidden by law. This act was committed in the court's presence and could have been summarily punished when it was performed.

The court did not lose its power to deal with such conduct merely because the judge patiently deferred any action until the end of the proceedings in order to avoid delay and disruption.

5. Petitioner's final contention is that his conduct was not obstructive (Pet. 19–23). Although, as the district court noted, the full extent of the contempt cannot be reflected in the record without observation of petitioner's conduct in the courtroom (see *Fisher* v. *Pace*, 336 U.S. 155, 161), the intemperate nature of petitioner's remarks does sufficiently appear from the record. A full examination of these incidents rebuts any suggestion that they were caused by the tension of a hotly contested trial. The misconduct was so frequent and repetitive as to reflect deliberate action. Petitioner's charges of "drum head court-martial," the court's protection of perjury, and his abuse of the court began as early as January 22 (R. 3593–3594), and were repeated on January 27 (R. 3599–3602), February 5 (R. 3664–3669), February 7 (R. 3679–3685), February 10 (R. 3713), February 11 (R. 3738–3740), February 13 (R. 3753–3760), February 19 (R. 3775), February 20 (R. 3779–3780), February 25 (R. 3813–3818) and February 27 (R. 3822–3826). They were prompted by ordinary rulings such as the court's statement that a matter had previously been covered by motions (R. 3593–3594); a limitation of the number of challenges to alternate jurors (R. 3601–3602); a ruling on the admissibility of a document (R. 3667–3668); a ruling that a hearing on alleged surveillance would be held at the conclusion rather

than in the midst of trial (R. 3739–3740); and a ruling making certain telephone transcriptions available to the defendants (R. 3813–3814).

Petitioner's conduct on February 7 (R. 3678–3685) would itself justify the sentence here imposed, although, as noted above, it was only one of a long series of outbursts by him. On that day, after petitioner had been requested not to make repetitious argument on the same objection, he accused the court of bias in the jury's presence and asked to withdraw and have the court defend his client (R. 3670–3671). He was warned by the court that "we will take it up at a later time" (R. 3671). After the jury had been excused, petitioner made a motion for a mistrial which was overruled (R. 3678). He then started a long colloquy on the same subject, interspersed with references to "drum head court-martial" (R. 3679–3680). The judge asked petitioner not to be so loud and to stay within the law (R. 3682). Petitioner continued the harangue, again ending with a characterization that the court was giving the government a "drum head court-martial proceeding" (R. 3682–3685). This kind of conduct, constantly repeated, cannot be excused as a momentary lapse or as necessary to support the interests of a client. The conduct here is entirely different in kind and degree from that involved in *In re McConnell,* 370 U.S. 230.

There is no merit to petitioner's argument that his repeated intemperate outbursts did not amount to contempt because they did not in fact obstruct justice. The kind of conduct in which petitioner engaged—

even though often outside the presence of the jury—constituted an obstruction of justice because it delayed the trial and demeaned the court. The fact that the judge remained unmoved by petitioner's conduct reflects more on the judge's patience and equanimity than on petitioner's conduct. Obviously an assault on a judge in a courtroom would be no less a contempt if the judge successfully resisted it and emerged unharmed than if he were seriously injured.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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